No. 97-2054

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In The

Supreme Court of the United States

October Term, 1997

PALM BEACH SOIL AND
WATER CONSERVATION DISTRICT,
a political subdivision of the State of Florida,

Petitioner,

vs.

MARK BLEDSOE,

Respondent.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit**

RESPONDENT'S BRIEF IN OPPOSITION

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PARTIES TO THE PROCEEDING

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STATEMENT OF THE CASE

This petition seeks review of an issue that every federal appellate court, and the overwhelming majority of district courts, have answered resoundingly in accordance with the unanimous disposition rendered by the Eleventh Circuit. The challenged holding is that Title II of the Americans With Disabilities Act ("ADA"), 42 U.S.C. §§ 12131, *et seq.*, encompasses employment discrimination.

Petitioner is seeking to have this Court reverse this nearly universal chorus of agreement so construing the ADA and would instead have this Court usurp the legislative function from Congress, as the trial court did here, and hold that Title II of the ADA applies only to "services," despite the fact that the plain language of the statute is not so constricted, and prohibits discrimination against qualified individuals with a disability in "services, *programs or activities . . . or* [that said qualified individuals] be subjected to discrimination by any such entity." 42 U.S.C. § 12132 (emphasis added).

Certainly, the provisions of Title II cited above, are reasonably construed to encompass "employment" since "employment" is undoubtedly one of the "services, programs or activities" of government, as previously construed by this Court for a substantially similar statute. Further, the language of the statute which prohibits, more generally, "discrimination by any such entity" is sufficiently broad to encompass employment discrimination also. The legislative history also supports this construction, as well as the legislatively mandated regulations promulgated by the executive branch through the Department of Justice.

There is no reason why this Honorable Court should review the Eleventh Circuit's decision, which, in view of the above considerations, is eminently correct. Moreover, review at this time would be premature because, in the extremely unlikely event that the Court *were* to agree with the petitioner's position, that would not dispose of the yet to be set trial, since respondent, Mark Bledsoe (hereinafter "Mr. Bledsoe" or "plaintiff"), has a claim under the Rehabilitation Act of 1973, 29 U.S.C. § 794 (hereinafter the "Rehabilitation Act"), which claim has been revived by the Eleventh Circuit's decision. This aspect of the decision has not been appealed and is now the law of the case.[1]

Mr. Bledsoe filed suit on June 24, 1994 against appellees Palm Beach Soil and Water Conservation District and Palm Beach County (hereinafter "District" and "County"), alleging violations of his rights under Title I of the ADA and the Rehabilitation Act. In essence, Mr. Bledsoe alleged that he had a disability within the meaning of the law, that the defendants, as his employers, failed to accommodate his disability, and that he was discharged as a result of this disability.

Litigation followed, and for purposes herein, the following summary of the case will suffice. The County argued that it was not Mr. Bledsoe's "employer" for purposes of the claims herein *and* that it had been

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[1] The trial court, as developed *infra*, had disposed of the Rehabilitation Act claim by holding that a worker's compensation settlement agreement, for a knee injury sustained by Mr. Bledsoe years before his termination, served as a bar to all of his claims. Relying on binding precedent from the Eleventh Circuit which the trial court declined to adhere to, the trial court's disposition of this issue was reversed, and review has not been sought by petitioner.

released from the claims here by virtue of Mr. Bledsoe's partial release of a wholly unrelated[2] claim for worker's compensation benefits. After considering the parties' cross-motions for summary judgment on the issues of the "employer-employee" relationship and the effect of the worker's compensation release on Mr. Bledsoe's claims under federal discrimination laws, the trial court issued an omnibus order, where it determined: 1. The County was *not* Mr. Bledsoe's employer, and therefore summary judgment would be entered for it on all claims; [but] 2. The worker's compensation settlement agreement did *not* release the County from the claims herein; 3. Mr. Bledsoe was disabled and terminated by the District as a direct result of his disability; 4. Issues of fact precluded summary judgment as to whether plaintiff was an "otherwise qualified" disabled individual, as to whether the District was subject to coverage under the Rehabilitation Act, as to whether the District failed to reasonably accommodate the plaintiff,[3] and as to whether a reasonable accommodation would constitute an undue hardship for the District.

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[2] Mr. Bledsoe sustained a work related injury to his left knee on February 26, 1990 and developed a condition know as *osteochondritis desicans*, which he contended constituted a disability within the meaning of the law. The trial court, in its first summary judgment order, relying on the testimony of Dr. Craig Lichtblau that Mr. Bledsoe had a permanent impairment, found that he was in fact disabled within the meaning of the law. Although the injury did directly lead to the disability, the claim for the injury was wholly separate and apart from the claim for a failure to accommodate and the termination.

[3] The petition represents that the District attempted to accommodate Mr. Bledsoe's disability by offering him the position of Resource Conservationist, and further, by offering

Thereafter, the County filed various motions for sanctions, attorney's fees and costs, against both Mr. Bledsoe and undersigned counsel. The trial court orally announced at a hearing held on said motions that it would award attorney's fees and costs against Mr. Bledsoe, under the standard set forth in *Christianburg Garment Company v. EEOC*, 434 U.S. 412 (1978), and, further announced it would hold a separate evidentiary hearing on plaintiff's counsel's liability under Rule 11, Federal Rules of Civil Procedure.[4] An evidentiary hearing was held on plaintiff's counsel's liability under Rule 11 on October 15, 1996. The parties resolved all of those issues and no aspect of this appeal applies to the County, the plaintiff having agreed to waive his right to appeal the trial court's disposition that the County was not his employer as a part of resolving the County's various motions for fees, costs and sanctions. As a result of the parties' resolution of these issues, the trial court denied

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him the opportunity to write his own job description. That is not accurate, otherwise this case would not be in court and the parties would have lived happily ever after. Mr. Bledsoe was terminated when he told his employer he would need surgery on his knee; he had earlier declined a transfer to another position because it would require *more*, not less, physical and emotional exertion on his part. Accordingly, the offer of the transfer, although not germane to the issues raised in appeal, is not accurately represented in the petition.

[4] This order was never reduced to writing but the purported basis of it was that Mr. Bledsoe's claim that the County was also his employer was incorrect. This extraordinarily harsh sanction was going to be imposed despite the fact that the County, in its own internal documents, admitted that *it was* Mr. Bledsoe's employer, and that the District was a department of the County.

as moot the various motions for attorney's fees, sanctions and costs filed by the County against Mr. Bledsoe and his counsel.

Following the dismissal of the County, litigation continued between the District and Mr. Bledsoe. Since the County was no longer a party to the case, and since it was undisputed that the District, by itself, did not have the requisite number of employees to effect coverage under Title I of the ADA, plaintiff sought leave to amend the complaint to bring a claim under Title II,[5] which request the trial court granted. Thereafter, plaintiff proceeded on his First Amended Complaint. The District answered and set forth various affirmative defenses.

The District then filed a motion for summary judgment, in which it contended that it was not a recipient of federal financial assistance and thus not subject to the Rehabilitation Act. The District withdrew the motion when plaintiff learned that the evidence which the District had submitted to the trial court was false. In contrast to the treatment afforded the plaintiff and his counsel over the claim that the County was also the plaintiff's employer, the trial court denied plaintiff's motion for sanctions against the District despite the false evidence, and even chided plaintiff's counsel for exposing the issue to the court.[6]

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[5] By motion filed February 16, 1995, long before disposition of the first summary judgment order, plaintiff sought to amend, by interlineation, his claim under Title I of the ADA to also state a claim under Title II. The trial court denied the motion.

[6] Plaintiff filed a motion to strike the District's factually groundless motion, and pointed out to the trial court that the

Thereafter the District moved for summary judgment on two separate grounds, one of which had previously been explicitly rejected by the trial court when the County asserted the argument: first, the District argued that it was not liable under Title II of the ADA because said law did not apply to discrimination in employment; second, the District said it was released from the federal claims here by virtue of plaintiff having resolved a portion of his worker's compensation claims against the County. Plaintiff opposed this motion by memorandum, pointing out to the trial court that it had previously rejected the very argument advanced by the District when it had been raised by the actual party to the worker's compensation settlement, the County; secondly, the plaintiff argued that the Department of Justice (D.O.J.) administrative regulations implementing Title II of the ADA, as well as the overwhelming weight of legislative history, and the emerging case law around the country, repudiated the District's argument that Title II did not include a prohibition against employment discrimination.

The trial court entered an order that receded from its earlier disposition of the release issue and also held that Title II did not cover employment discrimination. The trial court thereafter entered judgment in favor of the

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evidence submitted by the District was false. The trial court denied the motion as moot. Plaintiff moved for reconsideration of that part of the order denying plaintiff costs and fees as a sanction against the District forcing the plaintiff to take two (2) depositions that exposed that the motion should have never been filed since it was based on facts that were not true. The trial court declined to consider same on the merits because the District's motion for summary judgment on the federal funding issue had been withdrawn.

District on both claims. Plaintiff filed a motion for rehearing, which the trial court denied summarily one (1) day after the filing of the motion.

Thereafter, plaintiff filed a timely notice of appeal to the Eleventh Circuit, which reversed the trial court on both issues. *Bledsoe v. Palm Beach County Soil and Water Conservation District*, 133 F.3d 816 (11th Cir. 1998). Petitioner's motion for rehearing, and suggestion of rehearing *en banc*, were denied by the Eleventh Circuit. Petitioner then sought review in this Court by filing a petition for writ of certiorari.

REASONS FOR DENYING THE WRIT

The Eleventh Circuit correctly held that Title II of the ADA protects qualified individuals with disabilities from discrimination by public employers. The Eleventh Circuit reached this conclusion by examining the specific language of the ADA, Congress' intent in enacting the law, as well as regulations enacted by the Department of Justice, which reflect the Executive Branch's view of the law.

Congress clearly intended the ADA to prohibit employment discrimination by all employers against the disabled, excepting only federal employees that already had this protection under the Rehabilitation Act of 1973. *See* 42 U.S.C. § 12111(5)(B); 29 U.S.C. § 791. The purpose of the ADA is to "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1). Congress further recognized that [society has] "tended to isolate and segregate individuals with

disabilities and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem." 42 U.S.C. § 12101(a)(2).

By setting forth its purpose of providing a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities and to provide clear, strong, consistent, and enforceable standards addressing discrimination against individuals with disabilities, 42 U.S.C. § 12101(b), Congress hoped to ensure equality of opportunity for all qualified disabled people, full participation, economic self-sufficiency and the elimination of "billions of dollars in unnecessary expenses resulting from dependency and non-productivity." 42 U.S.C. § 12101(a)(8), (9). The decision of the Eleventh Circuit recognizing that Title II of the ADA protects public sector employees from discrimination by public sector employers is entirely consistent with the language of the statute, Congress' intent and with the decisions of the overwhelming majority of courts that have considered this issue.[7]

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[7] *See Doe v. University of Md. Med. Sys. Corp.*, 50 F.3d 1261, 1264-1265 (4th Cir. 1995); *Davoli v. Webb*, 943 F. Supp. 1289, 1297 (D. Colo. 1996); *Wagner v. Texas A&M Univ.*, 939 F. Supp. 1297, 1309 (S.D. Tex. 1996); *Graobski v. Guiliani*, 937 F. Supp. 258, 268-69 (S.D.N.Y. 1996); *Silk v. City of Chicago*, No. 95-C-0143, 1996 WL 312074, *10 (N.D. Ill. June 7, 1996); *Bruton v. Southeastern Pa. Transp. Auth.*, No. 94-CV-3111, 1994 WL 470277, *2 (E.D. Pa. Aug. 19, 1994); *Ethridge v. Alabama*, 847 F.Supp. 903, 906 (M.D. Ala. 1993), and 860 F. Supp. 808, 812 (M.D. Ala. 1994); *Eisfelder v. Michigan Dep't of Natural Resources*, 847 F. Supp. 78, 83 (W.D. Mich. 1993); *Finley v. Giacobbe*, 827 F. Supp. 215, 219-20 n.3 (S.D.N.Y. 1993), *aff'd on other grounds*, 79 F.3d 1285 (2d Cir. 1998);

A. The plain language of Title II of the ADA encompasses employment discrimination.

The plain language of Title II illustrates that Congress intended Title II to preclude employment discrimination. "In determining the scope of a statute, we first look to its language. If the statutory language is unambiguous, in the absence of a 'clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive.' " *Reves v. Ernst & Young*, 507 U.S. 170, 177 (1993) (citation omitted). *See also Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980).

After construing Title II of the ADA as protecting individuals with disabilities from employment discrimination in *dicta* found in several cases,[8] the Eleventh Circuit squarely held in this case that the express language of Title II protects public sector employees from discrimination on the basis of disability. Title II of the ADA provides, in relevant part:

> Subject to the provisions of this title, no qualified individual with a disability shall, by reason

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Petersen v. University of Wis. Bd. of Regents, 818 F.Supp. 1276, 1278 (W.D. Wis. 1993); *Bell v. Retirement Bd. of Firemen's Annuity & Benefit Fund of Chicago*, No. 92-C-5197, 1993 WL 398612, *4 (N.D. Ill. Oct. 6, 1993). *But see Iskander v. Rodeo Sanitary Dist.*, No. 94-C-0479, 1995 WL 5678, *9 (N.D. Cal. Feb 7, 1995); *Dertz v. City of Chicago*, 912 F. Supp. 319, 325 (N.D. Ill. 1995).

[8] *See Holbrook v. City of Alpharetta*, 112 F.3d 1522, 1528-29 (11th Cir. 1997); *McNely v. Ocala Star-Banner Corp.*, 99 F.3d 1068, 1073 (11th Cir. 1996).

> of such disability, be excluded from participation in or be denied the benefits of the *services, programs, or activities* of a public entity, *or be subjected to discrimination by any such entity.*

42 U.S.C. § 12132 (emphasis added). Certainly, the language which is emphasized above in the statute can reasonably be understood to encompass employment discrimination.

As Justice Scalia recently noted for a unanimous Court: " . . . statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." *Oncale v. Sundowner Offshore Services, Inc.*, ___U.S.___, 118 S. Ct. 998, 1002 (1998). In other words, under a democratic form of government, it is not the function of courts to usurp legislative authority, but to carry out and enforce the legislative mandate, even when the expression of that mandate leads to prohibition of an evil that may or may not have been contemplated at the time of enactment of the law.[9]

The Eleventh Circuit's interpretation of the language of Title II is consistent with interpretations given by this Court to other similarly worded federal anti-discrimination provisions, namely, Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, and the Rehabilitation Act of 1973, 29 U.S.C. § 794. § 901(a) of Title IX states:

> No person in the United States shall, on the basis of sex, be excluded from participation in,

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[9] However, as developed *infra*, the legislative history leaves little doubt that Congress intended Title II to encompass employment discrimination.

> be denied the benefits of, or be subject to discrimination under any education *program or activity* receiving Federal financial assistance.

20 U.S.C. § 1681 (emphasis added). In construing this similarly worded statute, this Court in the case of *North Haven Bd. of Education v. Bell*, 456 U.S. 512 (1982), held that the language of Title IX provides protection against employment discrimination. The language of the Education Amendments prohibiting discrimination in any "education **program or activity**" closely parallels the language of Title II of the ADA prohibiting discrimination in any "**services, programs, or activities** of a public entity" (emphasis added). The Eleventh Circuit's opinion in this case correctly interpreted the language of Title II as prohibiting discrimination in all of its forms, including employment. Such a conclusion is reasonable in light of the *North Haven* decision, which petitioner conveniently omits from its petition. This omission, it is respectfully submitted, speaks volumes about the credibility of the argument raised by petitioner.

Part of the language of Title II of the ADA prohibits public entities from excluding disabled individuals from "services, programs or activities" or denying them the benefits of those services, programs, or activities. The trial court in this case focused on the meaning of the words "services, programs, or activities." *Bledsoe v. Palm Beach Soil and Water Conservation District*, 942 F. Supp. 1439, 1443 (S.D. Fla. 1996). It indicated it found support for its conclusion that the term "services, programs, or activities" was not intended to include employment claims. However, this issue does not necessarily turn

solely on the meaning of "services, programs, or activities," but rather on the rest of the prohibition; "*or* be subjected to discrimination by any such entity." At least one court has focused on the disjunctive "or" to reject a public entity's argument that discrimination that did not involve "services, programs or activities" was permissible under the ADA. *Crowder v. Kitagawa*, 81 F.3d 1480, 1483 (9th Cir. 1996). In *Crowder*, the Ninth Circuit rejected the district court's dismissal of plaintiff's challenge to Hawaii's quarantine requirement because it was "not a service or benefit provided by the state," stating:

> The flaw in this analysis is the assumption that no violation of the ADA takes place unless a service or benefit of the state is provided in a manner that discriminates against disabled individuals. This is simply not so. Section 12132 of the ADA precludes (1) exclusion from/denial of benefits of public services, as well as (2) discrimination by a public entity. Due to the insertion of "or" between exclusion from/denial of benefits on the one hand and discrimination by a public entity on the other, we conclude congress intended to prohibit two different phenomena. Congress intended to prohibit outright discrimination, as well as those forms of discrimination which deny disabled persons public services disproportionately due to their disability.

Id.

The trial court's disposition, correctly rejected by the Eleventh Circuit, would do violence to this Court's decision in *North Haven*, as discussed *supra*. It would also ignore the general prohibition against discrimination set

forth in the disjunctive, which as recognized by the Ninth Circuit in *Crowder,* creates a separate set of prohibitions. The plain language of Title II therefore supports the holding that employment discrimination is within the boundaries of the evils Congress sought to outlaw.

B. The legislative history demonstrates that Congress intended to prohibit employment discrimination under Title II of the ADA.

Not only does the plain language of Title II lead to this conclusion, but the legislative history also clearly indicates Congress' intent that Title II serve as a prohibition against employment discrimination. Petitioner's suggested interpretation is directly contrary to Congress' expressed intent.

The close relationship between Section 504 of the Rehabilitation Act of 1973 and the enactment Title II of the ADA is evident from the ADA's legislative history. The express and repeated references to provisions of Section 504 of the Rehabilitation Act of 1973 in the ADA's legislative history are crucial to understanding Congress' intent in regard to Title II. The first sentence of the Section by Section Analysis regarding Section 202 of the ADA's prohibition on discrimination reads: "Title II extends the protection of Section 504 of the Rehabilitation Act to cover all programs of state and local governments, regardless of the receipt of Federal financial assistance." H. Rep. No. 485(II), 101st Cong., 2d Sess. 84 (1990), reported in U.S.C.C.A.N 472. The legislative history further indicates "The purpose of Title II is to continue to

break down barriers to the integrated participation of people with disabilities in all aspects of community life. The Committee intends that Title II work in the same manner as Section 504." *Id.* at 473.

This Court held in *Consolidated Rail Corp. v. Darrone*, 465 U.S. 624 (1984), that a primary purpose of Section 504 of the Rehabilitation Act was to afford those with disabilities protection against employment discrimination, even though the statute did not expressly mention discrimination in the employment context. Although an examination of the legislative history was not imperative to the Eleventh Circuit's holding, the legislative history lends support to its holding.

The fact that Congress intended Title II to work in the same manner as Section 504 of the Rehabilitation Act is significant because Section 504 was so focused on employment discrimination that Congress enacted subsequent legislation to clarify that Section 504 applied to other forms of discrimination in addition to employment discrimination. The first case in which this Court considered Section 504, *Consolidated Rail v. Darrone, supra*, was an employment discrimination case, continued after the plaintiff's death by his estate.[10]

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[10] The Court was asked to address the scope of the private right of action to enforce Section 504 of the Rehabilitation Act of 1973 prohibiting discrimination against the handicapped by federal grant recipients. The Court announced "Among its purposes [the Rehabilitation Act], as originally stated, were to 'promote and expand employment opportunities in the public and private sectors for handicapped individuals and to place such individuals in employment.' 29 U.S.C. Sec. 701(8)," *Id.* The Court went on to say "It is clear Section 504 itself contains no

The statutory language used by Congress in the creation of Title II is brief. However, extensive legislative commentary regarding the applicability of Title II to employment discrimination is so pervasive as to belie any contention that Title II does not apply to employment actions. The Report of the House Judiciary Committee stated that "In the area of employment, Title II incorporates the duty set forth in the regulations for Sections 501, 503 and 504 of the Rehabilitation Act to provide a 'reasonable accommodation'[11] that does not constitute an 'undue hardship.' "[12] The Report goes on to state that reasonable accommodation is "central to the non-discrimination mandate," even though it may require "substantial amounts of time and money to keep handicapped employees on the payroll." *Id.* at 51, *quoting Rhone v. U.S. Department of the Army*, 665 F. Supp. 734, 745, n.19 (E.D.Mo. 1987). The Report discusses the concept of undue hardship, advising that "a number of factors, including the size and budget of *the employer* are set forth as factors to be considered." *Id.* (emphasis added). It is

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such limitation [limiting an action to employers receiving Federal funds whose primary objective is to provide employment]. Section 504 neither refers explicitly to Section 604 nor contains analogous limiting language; rather, that section prohibits discrimination against the handicapped under *'any* program or activity receiving Federal financial assistance.' " And it is unquestionable that the section was intended to reach employment discrimination. *Id.* at 632.

[11] Whether or not appellee breached that duty of reasonable accommodation is in fact the issue raised in this case.

[12] H. Rep. 101-485(II), 101st Cong., 2d Sess. 84 (1990) at p. 50, reprinted in 1990 U.S.C.C.A.N. 445, 473.

impossible to reconcile these specific legislative concerns with the trial court's stingy construction of a law that Congress passed with the notion of invoking the " . . . sweep of congressional authority . . . in order to address major areas of discrimination faced day-to-day by people with disabilities." 42 U.S.C. § 12101(b)(4).

In explaining the forms of discrimination prohibited by Title II, the Report noted that:

> The Committee intends, however, that the forms of discrimination prohibited by Section 202 [codified as 42 U.S.C. § 12132] be identical to those set out in the applicable provisions of titles I and II of this legislation . . . In addition, activities which do not fit into the employment or public accommodations context are governed by the analogous Section 504 regulations.

Id. at p. 367.

The repeated invocations of Section 504 of the Rehabilitation Act of 1973 throughout the legislative history are crucial to understanding the intent of Congress with regard to Title II. Since the legislative history is in accord with the statutory language, the Eleventh Circuit was correct to hold that Title II encompasses employment discrimination.

C. The legislatively mandated executive branch regulations also support the holding that Title II encompasses employment discrimination.

In its opinion, the Eleventh Circuit also relied upon regulations promulgated by the Attorney General mandated by Title II. Title II required the Attorney General to

implement regulations giving effect to the anti-discrimination provisions of Title II:

> Unlike the other titles in this Act, title II does not list all of the forms of discrimination that the title is intended to prohibit. Thus, the purpose of this section is to direct the Attorney General to issue regulations setting forth the forms of discrimination prohibited.

H. Rep. 191-485(II), 101st Cong., 2d Sess. 84 (1990) at p. 50, reprinted in 1990 U.S.C.C.A.N. 445, 475. Pursuant to Congress' direction, the Attorney General promulgated regulations addressing employment discrimination by public entities:

> (a) No qualified individual with a disability shall, on the basis of disability be subjected to discrimination in employment under any service, program or activity conducted by a public entity.
>
> (b)(1) For purposes of this part, the requirements of title I of the act. . . . apply to employment in any service program or activity conducted by a public entity if that public entity is also subject to the jurisdiction of title I [i.e., employs fifteen or more employees].
>
> (b)(2) For the purposes of this part, the requirements of Section 504 of the Rehabilitation Act of 1973, as established by the regulations of the Department of Justice in 28 C.F.R. Part 41, as those requirements pertain to employment, apply to employment in any service, program or activity conducted by a public entity if that public entity is not also subject to the jurisdiction of Title I.

28 C.F.R. 35.140.

As with all properly enacted executive agency regulations, the DOJ's regulations should be given great weight. "Considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer. [Unless those regulations are] arbitrary, capricious, or manifestly contrary to the statute." *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984). These regulations were enacted pursuant to specific direction by Congress. They are consistent with the specific language of the statute, legislative history related to the ADA, as well as the overall policy underlying the ADA.

Moreover, these regulations have been in effect now for many years, and Congress has taken no action to effect a legislative override of the regulations, which it certainly could do, if it so chose. As the Eleventh Circuit noted in a prior decision, which it reiterated in this case: " '[C]ongress is deemed to know the executive and judicial gloss given to certain language and thus adopts the existing interpretation unless it affirmatively acts to change its meaning.' " *Bledsoe, supra*, 133 F. 3d at 822 (Citing to *Florida National Guard v. Federal labor Relations Authority*, 699 F.2d 1082, 1087 (11th Cir. 1983)).

Petitioner argues that application of Title II to the employment context will lead to either redundant or inconsistent results. Petitioner asserts that because Title II of the ADA does not require exhaustion of administrative remedies and does not have a threshold requirement that the employer have a certain amount of employees, it could not have been intended to apply to employment discrimination. Each of these arguments is misplaced. The Attorney General concluded while promulgating the

above referenced regulations related to Title II that "Congress intended to cover the employment practices of all public entities." 28 C.F.R. Pt. 35, App. A, Subpt. C. For that reason and analogous to Section 504 of the Rehabilitation Act, Title II does not require the public employer to have a threshold number of employees.

Additionally, it is not problematic that Title II does not require exhaustion of administrative remedies as a prerequisite to relief. "It is not the Committee's intent that persons with disabilities need to exhaust Federal administrative remedies before exercising their private right of action under Section 202." H.R. Rep. No. 101-485(II), 101st Cong., 2d Sess. at 98 (1990). See also S. Rep. No. 116, 101st Cong., 1st Sess. at 57-58 (1989).

Finally, petitioner complains that under Title II, the damages it is exposed to are not limited by a statutory cap that is in place under Title I. This is true, but it is not a reason to invalidate the law or deem it inapplicable to employment. Public sector employers who are recipients of federal funding are also subject to damage awards that are cap-less under the Rehabilitation Act; this is so whether the employer has one (1) or 1,000 employees. There are different remedies provided for victims of age discrimination, and for victims of other forms of discrimination, such as race, sex, national origin, religion, color and disability. Compare 29 U.S.C. § 626(c), which incorporates the remedies of the Fair Labor Standards Act, 29 U.S.C. § 216(b), with the remedies found for Title VII at 42 U.S.C. § 1981a.

Petitioner seems to be under the impression that for Congress to validly enact a law, it must do so following a

principle of perfect symmetry, at least when it comes to capping damages. But that is not so. In fact, legislative power may treat different evils with different remedies. There are no legislatively mandated caps for claims of race discrimination under 42 U.S.C. § 1981, or for claims brought under 42 U.S.C. § 1983. Does that mean that those laws are invalid because in Title VII Congress has capped compensatory and punitive damages, which caps are driven by the number of persons employed? Of course not. Making these decisions is a legislative function, and courts, under our system of government, are not authorized to impose a more exacting symmetry, as petitioner would urge this Court to do. Invalidating a statute, or, as the trial court did here, excepting a class of employers from its reach, because the statute is not perfectly symmetrical on the issue of damages, constitutes a usurpation of legislative authority. Under our representative form of democracy, only our elected representatives may legislate. The Eleventh Circuit properly repudiated the trial court's effort to legislate from the bench, as must this Court.

CONCLUSION

There is no reason for this Court to review the issue raised by the petitioner. The great tide of judicial authority is against the petitioner; the legislative history and executive branch regulations are against the petitioner. And, perhaps most importantly, Congress, after years of living with the judicial gloss given to Title II of the ADA and the Department of Justice's comprehensive regulations, has not seen a reason to correct these constructions.

Congress has certainly done so in the past, as in passage of the Civil Rights Act of 1991, and may do so in the future. But it is not for this Court to truncate the laws of Congress, as the trial court did here without justification. The petition for certiorari should be denied.

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Respectfully submitted,

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